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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

MELINDA MARSHALL,

Defendant and Appellant.

B200361

(Los Angeles County  
Super. Ct. No.SA049532)

APPEAL from a judgment of the Superior Court of Los Angeles County,  
James R. Brandlin and Cynthia Rayvis, Judges. Modified and, as so modified, affirmed.

William J. Capriola, under appointment by the Court of Appeal, for Defendant and  
Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant  
Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Susan D. Martynec  
and Alene M. Games, Deputy Attorneys General, for Plaintiff and Respondent.

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Melinda Ann Marshall appeals the judgment entered following her conviction based on her plea of no contest to attempted kidnapping of a child under the age of 14 years. (Pen. Code, §§ 664/208, subd. (b).)<sup>1</sup> Marshall also admitted a prior conviction within the meaning of the “Three Strikes” law and section 667, subdivision (a). The trial court sentenced Marshall to 10 years in state prison.

We reject Marshall’s contention she was incompetent to stand trial at the time of her no contest plea and affirm the judgment as modified to correct the award of presentence custody credit.

### **FACTS AND PROCEDURAL BACKGROUND**

#### *1. The underlying incident.*

On July 26, 2003, shortly after midnight, Carol S. was on the Santa Monica Pier with her family and her sister’s family. While their husbands fished from the pier, Carol S. and her sister went to the ring toss booth with Carol S.’s daughter, Ashlee. Marshall, a stranger to Carol S., grabbed Ashlee by the left wrist and “pulled her aggressively” 10 or 15 feet from the side of Carol S.’s sister. Ashlee “was being basically dragged.” Carol S. confronted Marshall and demanded to know what she was doing. Marshall faced Carol S. and yelled, “This is my daughter. You stole her from me yesterday, you bitch.” Carol S. told Marshall that Ashlee was her daughter and not to try that again. Marshall “got in [Carol S.’s] face” and cursed Carol S. loudly and “vulgarly” for about 30 seconds before walking away.

The police officers who arrested Marshall formed the opinion she was either under the influence of drugs or insane and transported her to the hospital for evaluation. Marshall spit in the face of an officer who was in the process of buckling Marshall’s seat belt before transporting her.

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<sup>1</sup> Subsequent unspecified statutory references are to the Penal Code.  
The trial court granted Marshall’s request for a certificate of probable cause.  
(§ 1237.5.)

Marshall was charged with attempted kidnapping of a child under the age of 14 years and misdemeanor battery on a peace officer (§ 243, subd. (b)).

*2. Marshall is found incompetent to stand trial.*

On July 30, 2003, Marshall appeared for arraignment. Marshall made repeated bizarre outbursts during the hearing and the trial court declared a doubt as to her competence. (§§ 1367, et seq.) A preliminary hearing was conducted on September 9, 2003, pursuant to section 1368.1, subdivision (a).<sup>2</sup> Prior to and after the preliminary hearing, Marshall made bizarre outbursts.

On October 1, 2003, the trial court suspended criminal proceedings and appointed two experts, Dr. Jack Rothberg and Dr. Kaushal Sharma, to examine Marshall. On October 27, 2003, the trial court received the reports of the doctors pursuant to a stipulation of the parties, found Marshall not presently competent to stand trial and committed her to the California Department of Mental Health for placement in a state hospital until such time as her competency was restored. Marshall was received at Patton State Hospital on January 21, 2004. Periodic progress reports from the hospital's medical staff recommended retention and treatment.

On June 2, 2005, the staff at Patton State Hospital certified Marshall as competent and on July 14, 2005, criminal proceedings were reinstated. However, two weeks later, at defense counsel's request, the trial court declared a doubt as to Marshall's competence, suspended criminal proceedings and again appointed Drs. Rothberg and Sharma to evaluate Marshall.

On November 15, 2005, the trial court found Marshall not competent to stand trial and ordered her returned to Patton State Hospital. The trial court noted defense counsel concurred with the trial court's finding. The trial court ordered Marshall to take psychotropic medications that may be deemed necessary for treatment.

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<sup>2</sup> As relevant here, section 1368.1, subdivision (a) provides: "If the action is on a complaint charging a felony, proceedings to determine mental competence shall be held prior to the filing of an information unless the counsel for the defendant requests a preliminary examination . . . ."

On May 25, 2006, the medical staff at Patton State Hospital indicated Marshall was now able to cooperate with counsel. However, on June 26, 2006, the medical staff reported Marshall's medical condition had deteriorated and the staff was no longer of the opinion that Marshall was mentally competent. On June 27, 2006, the trial court again declared in doubt as to Marshall's competence and ordered her to be treated at Patton State Hospital.

On September 21, 2006, medical staff at Patton State Hospital reported Marshall was competent to stand trial and on October 10, 2006, the trial court reinstated criminal proceedings.

However, on February 20, 2007, the trial court again declared a doubt as to Marshall's competence, suspended criminal proceedings and appointed Dr. Richard Romanoff and Dr. Sharma to evaluate Marshall.

*3. Marshall's competence is restored.*

On April 2, 2007, the trial court indicated it had read and considered the doctors' reports.<sup>3</sup> Defense counsel indicated she had "seen significant progress in Miss Marshall's

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<sup>3</sup> Dr. Sharma's report concluded Marshall presently was competent to stand trial contingent on her continued use of psychotropic medication. Dr. Sharma noted that, although Marshall remained delusional in some respects, she "was aware of her present legal predicament. She was able to discuss the circumstances surrounding her arrest, she knew the date she was arrested, she knew that she had been previously found incompetent to stand trial, she even knew her diagnosis, and was able to recall her attorney's name . . . . The defendant stated that given the fact that she has been in custody for more than three years, she should be released or at least she should have a trial. The defendant was aware of the date she is suppose[d] to return to Court, . . . and she was aware of the . . . [of the] consequences of her pending charges."

Dr. Romanoff's report indicated "there is extremely strong and consistent evidence indicating that Ms. Marshall suffers from an active psychotic mental illness . . . . She appears to have a particularly severe case of this illness, and even when taking psychotropic medication, active symptoms of this illness remain in place. . . . While she appears to be in a state of partial remission in comparison to her level of functioning at a more acute phase of her illness, she continues to exhibit evidence of active delusional thinking and significant cognitive disorganization at this time. Overall evidence indicates

behavior and her competency and I feel confident that she at this moment is competent. And I believe that in the last three weeks that her competence has improved. And so she has indicated a desire to move forward with her case and I don't have any objection. I think she is competent at this time."

The trial court thereafter found Marshall competent to stand trial and reinstated criminal proceedings.

4. *Change of plea and sentencing pursuant to a plea bargain.*

On May 8, 2007, pursuant to a plea bargain, Marshall pleaded no contest to the charge of attempted kidnapping of a child under the age of 14 years and admitted prior conviction allegations. In exchange, the trial court agreed to sentence Marshall to the low term, doubled, plus five years, or a total of 10 years in state prison. The change of plea form noted Marshall had actual custody credits of 1064 days and 718 days of hospital credits.

Throughout the change of plea Marshall answered the prosecutor's questions, "yes," or "no." The only exception was when the prosecutor asked whether anyone had made Marshall any promises other than those that had been stated in court. Marshall responded, "No. My spirits talk to me."

The trial court imposed the negotiated term and awarded Marshall custody credit for 718 days spent in the state hospital and 1,064 days of actual custody plus 159 days of conduct credit under section 2933.1.

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that Ms. Marshall has at least average intellectual abilities and intact underlying cognitive functioning."

Dr. Romanoff concluded Marshall remained "marginally incompetent to stand trial" because "as a direct result of her ongoing illness she remains incapable of rationally cooperating with her attorney or rationally contributing to her defense." Dr. Romanoff reached this conclusion notwithstanding his finding that Marshall had a "generally clear understanding of the charge alleged against her" and the roles of the various court officers and the functioning of the criminal court. "However, given her belief that she is innocent, the ongoing presence of active delusional thinking and significant cognitive disorganization prevents her from coherently expressing her recollections to her attorney in an attempt to develop an appropriate defense."

## CONTENTIONS

Marshall contends the trial court should have declared a doubt as to her competence and suspended criminal proceedings based on Marshall's bizarre comment during the change of plea. Marshall also contends she is entitled to custody credits at the rate of 50 percent under section 4019.

## DISCUSSION

### 1. *The trial court properly accepted Marshall's no contest plea.*

Marshall argues that, in light of her long history of bizarre behavior and repeated hospitalizations due to incompetency, the trial court should have ordered another evaluation under section 1368 based on Marshall's statement during the change of plea that, "My spirits talk to me." Marshall notes she repeatedly had been found to be incompetent over the four years following her arrest and her windows of competence were short lived. Marshall claims the eerie remark she made at the change of plea casts serious doubt on her mental condition and, based thereon, the trial court should have suspended criminal proceedings once more and appointed experts to determine her competence. According to Marshall, the failure to do so requires reversal of the judgment.

The relevant principles are well settled. Trial of an incompetent defendant violates the due process clause of the Fourteenth Amendment to the United States Constitution and article I, section 15 of the California Constitution. (*People v. Welch* (1999) 20 Cal.4th 701, 736.) These constitutional guarantees are supplemented by section 1367 which states "a person is mentally incompetent to stand trial if, as a result of mental disorder or developmental disability, the defendant is unable to understand the nature of the criminal proceedings or to assist counsel in the conduct of a defense in a rational manner. (§ 1367.)" (*People v. Welch, supra*, at p. 736.)

A trial court is required “to suspend trial proceedings and conduct a competency hearing whenever the court is presented with substantial evidence of incompetence, that is, evidence that raises a reasonable or bona fide doubt concerning the defendant’s competence to stand trial. [Citations.] The court’s duty to conduct a competency hearing may arise at any time prior to judgment. [Citation.] Evidence of incompetence may emanate from several sources, including the defendant’s demeanor, irrational behavior, and prior mental evaluations. [Citations.] But to be entitled to a competency hearing, ‘a defendant must exhibit more than . . . a preexisting psychiatric condition that has little bearing on the question . . . whether the defendant can assist his defense counsel.’ [Citations.]” (*People v. Rogers* (2006) 39 Cal.4th 826, 847.)

“ ‘When a competency hearing has already been held and defendant has been found competent to stand trial, however, a trial court need not suspend proceedings to conduct a second competency hearing unless it “is presented with a substantial change of circumstances or with new evidence” casting a serious doubt on the validity of that finding.’ ” (*People v. Lawley* (2002) 27 Cal.4th 102, 136, quoting *People v. Kelly* (1992) 1 Cal.4th 495, 542.)

Applying these principles here, it is apparent Marshall’s solitary unusual remark during the course of the change of plea did not establish a change of circumstances or new evidence casting doubt on the prior finding of competence to stand trial. More than “bizarre actions” or “bizarre statements” are required to raise a doubt with respect to a defendant’s mental competence. (*People v. Welch, supra*, 20 Cal.4th at p. 742.) Additionally, the trial court had before it extensive expert opinion respecting Marshall’s competence. In sum, Marshall fails to demonstrate the trial court had a duty to conduct another competency hearing.

2. *Marshall's presentence custody credits must be corrected.*

As noted, at the time of sentencing, the trial court awarded Marshall credit for 1,064 days of actual custody plus 159 days of conduct credit under section 2933.1.<sup>4</sup> Additionally, the trial court awarded 718 days of credit for time spent in the state hospital.

Marshall contends that, although kidnapping in violation of section 208, subdivision (b), is a violent felony, an attempt to commit that offense is not a violent felony. (See § 667.5, subd. (c)(14).) Marshall concludes that, because she was not convicted of a violent felony, she should have been awarded 532 days of conduct credit under section 4019 based on the 1,064 days of actual custody.<sup>5</sup>

The People concede that an attempt to violate section 208, subdivision (b) is not one of the felonies listed in section 667.5, subdivision (c), and that Marshall correctly has computed the conduct credits to which she is entitled under section 4019. It appears these concessions are well taken. Accordingly, we shall order the judgment modified to reflect 532 days of conduct credit based on her service of 1,064 days of actual custody for a total presentence custody credit of 1,569.

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<sup>4</sup> Section 2933.1, subdivision (a), provides: "Notwithstanding any other law, any person who is convicted of a felony offense listed in subdivision (c) of Section 667.5 shall accrue no more than 15 percent of worktime credit . . . ."

<sup>5</sup> Section 4019, subdivisions (b) and (c) provide that for each six-day period in which a prisoner is confined in or committed to a specified facility, one day shall be deducted from the period of confinement unless the prisoner has refused to satisfactorily perform assigned labor, and one day shall be deducted for compliance with the rules and regulations of the facility.

Presentence custody credit under section 4019 is calculated by dividing the number of days spent in custody by four and rounding down to the nearest whole number. This number is then multiplied by two and the total added to the original number of days spent in custody. (*People v. Philpot* (2004) 122 Cal.App.4th 893, 908; *People v. Smith* (1989) 211 Cal.App.3d 523, 527.)



### **DISPOSITION**

The judgment is modified to reflect an award of 1,569 days of presentence custody credits (1,064 actual and 532 conduct), plus 718 days of credit for time spent in the state hospital. As so modified, the judgment is affirmed. The trial court is directed to prepare and forward to the Department of Corrections and Rehabilitation an amended abstract of judgment reflecting the modification.

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KLEIN, P. J.

We concur:

KITCHING, J.

ALDRICH, J.